

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MCILWAIN, LLC,  
Plaintiff,  
v.  
STEVE W. BERMAN, et al.,  
Defendants.

Case No. 18-cv-03127 CW

ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
REVOKE PRO HAC VICE ADMISSION  
AND FOR MONETARY SANCTIONS

(Dkt. No. 93)

In this action for breach of contract and related claims, Defendant Hagens Berman Sobol Shapiro LLP (Hagens Berman) moves for an order revoking the pro hac vice admission of Timothy Joseph McIlwain (McIlwain), who is counsel for Plaintiff McIlwain, LLC (Plaintiff). Docket No. 93. McIlwain filed an untimely opposition to the motion. Docket No. 95. For the reasons set forth below, the motion is GRANTED IN PART and DENIED IN PART.

BACKGROUND

On January 31, 2019, McIlwain, an out-of-state attorney, filed an application under Civil Local Rule 11-3 to appear pro hac vice as counsel for Plaintiff. Application at 1, Docket No. 73. There, McIlwain represented, among other things, that he was an active member in good standing of the bar of the United States District Court for the District of New Jersey, and that his local co-counsel would be Josh Schein. Id. He also declared under penalty of perjury that he would "familiarize [him]self with, and abide by, the Local Rules of this Court, especially the Standards

1 of Professional Conduct for attorneys and the Alternative Dispute  
2 Resolution Local Rules.” Id. The Court granted the application  
3 on February 4, 2019, “subject to the terms and conditions of  
4 Civil L.R. 11-3.” Order at 2, Docket No. 74.

5 Hagens Berman now moves for an order revoking McIlwain’s pro  
6 hac vice admission and for an order sanctioning McIlwain, under  
7 28 U.S.C. § 1927 and the Court’s inherent power, in the amount of  
8 the attorneys’ fees and costs it incurred in connection with the  
9 present motion. Hagens Berman contends, and McIlwain does not  
10 dispute in his untimely opposition, that McIlwain has failed to  
11 comply with his obligations under Civil Local Rule 11, which  
12 include complying with the local rules and the applicable  
13 standards of professional conduct. Although some of McIlwain’s  
14 problematic conduct as described in the motion involves repeated  
15 failures to comply with discovery obligations, Hagens Berman has  
16 not filed a discovery letter brief or taken any other action to  
17 seek Court intervention in connection with such conduct.

18 LEGAL STANDARD

19 I. Pro hac vice admission

20 An attorney who is not a member of the bar of this Court may  
21 apply to appear pro hac vice in a particular action in this  
22 district by submitting to the Clerk a certificate of good  
23 standing issued by the appropriate authority governing attorney  
24 admissions for the relevant bar, a written application, and an  
25 oath certifying: (1) that he or she is an active member in good  
26 standing of the bar of a United States Court or of the highest  
27 court of another State or the District of Columbia; (2) that he  
28 or she agrees to abide by the standards of professional conduct

1 set forth in Civil Local Rule 11-4<sup>1</sup>, and to become familiar with  
 2 the local rules and alternative dispute resolution programs of  
 3 this Court and, where applicable, with the bankruptcy local  
 4 rules; and (3) that an attorney, identified by name and office  
 5 address, who is a member of the bar of this Court in good  
 6 standing and who maintains an office within the State of  
 7 California, is designated as co-counsel. Civil L.R. 11-3(a).

8 The assigned judge "shall have discretion to accept or  
 9 reject the application." Civil L.R. 11-3(c). "When a district  
 10 court admits an attorney pro hac vice, the attorney is expected  
 11 to follow local rules." In re Bundy, 840 F.3d 1034, 1047 (9th  
 12 Cir. 2016) (citation omitted).

13 A district court may revoke an attorney's pro hac vice  
 14 admission under its inherent power "to control admission to its  
 15 bar and to discipline attorneys who appear before it." Lasar v.  
 16 Ford Motor Co., 399 F.3d 1101, 1118 (9th Cir. 2005) (citation and  
 17 internal quotation marks omitted). "Pro hac vice counsel, once  
 18 admitted, are entitled to notice and an opportunity to respond  
 19 before being disqualified and having their status revoked." Cole  
 20 v. U.S. Dist. Court For Dist. of Idaho, 366 F.3d 813, 822 (9th  
 21 Cir. 2004). That said, the "opportunity to be heard does not  
 22 require an oral or evidentiary hearing on the issue . . . the  
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24 <sup>1</sup> Civil Local Rule 11-4 requires every attorney admitted to  
 25 practice in this Court under Civil Local Rule 11 to: (1) be  
 26 familiar and comply with the standards of professional conduct  
 27 required of members of the State Bar of California; (2) comply  
 28 with the local rules; (3) maintain respect due to courts of  
 justice and judicial officers; (4) practice with the honesty,  
 care, and decorum required for the fair and efficient  
 administration of justice; (5) discharge his or her obligations  
 to his or her client and the Court; and (6) assist those in need  
 of counsel when requested by the Court.

1 opportunity to brief the issue fully satisfies due process  
2 requirements." Lasar, 399 F.3d at 1112 (internal citation and  
3 quotation marks omitted). "These minimal procedural requirements  
4 give an attorney an opportunity to argue that his actions were an  
5 acceptable means of representing his client, to present  
6 mitigating circumstances, or to apologize to the court for his  
7 conduct." Id. at 1110 (citation omitted).

8 II. Sanctions under 28 U.S.C. § 1927

9 Any attorney "who so multiplies the proceedings in any case  
10 unreasonably and vexatiously may be required by the court to  
11 satisfy personally the excess costs, expenses, and attorneys'  
12 fees reasonably incurred because of such conduct." 28 U.S.C. §  
13 1927; see also Pac. Harbor Capital, Inc. v. Carnival Air Lines,  
14 Inc., 210 F.3d 1112, 1117 (9th Cir. 2000) ("Section 1927  
15 authorizes the imposition of sanctions against any lawyer who  
16 wrongfully proliferates litigation proceedings once a case has  
17 commenced."). "The imposition of sanctions under § 1927 requires  
18 a finding of bad faith." Pac Harbor Capital, 210 F.3d at 1118.  
19 An attorney subject to sanctions under Section 1927 is "entitled  
20 to due process, including notice and an opportunity to be heard.  
21 However, an opportunity to be heard does not require an oral or  
22 evidentiary hearing on the issue." Id. (internal citation and  
23 quotation marks omitted). "The opportunity to brief the issue  
24 fully satisfies due process requirements." Id. (citation  
25 omitted).

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1 III. Sanctions under the Court's inherent authority

2 A district court's inherent authority to impose civil  
 3 sanctions "can be invoked even if procedural rules exist which  
 4 sanction the same conduct." Chambers v. NASCO, Inc., 501 U.S.  
 5 32, 49 (1991). "[A]n assessment of attorney's fees is  
 6 undoubtedly within a court's inherent power." Id. at 45. That  
 7 said, a finding of "bad faith or conduct tantamount to bad faith"  
 8 is required to impose sanctions under the court's inherent  
 9 authority. Fink v. Gomez, 239 F.3d 989, 994 (9th Cir. 2001).

10 ANALYSIS

11 I. Revoking McIlwain's pro hac vice admission is warranted

12 Hagens Berman moves for an order revoking McIlwain's pro hac  
 13 vice admission. Hagens Berman contends that the relief it seeks  
 14 is warranted because McIlwain has failed to meet his obligations  
 15 under Civil Local Rule 11, as follows: (1) McIlwain failed to  
 16 participate meaningfully and promptly in conferences required by  
 17 Rule 26(f) and meet-and-confers required by the local rules; (2)  
 18 McIlwain failed to timely produce complete responses to discovery  
 19 requests and to exchange ESI information required by Rule 26; (3)  
 20 McIlwain made misrepresentations and false promises regarding the  
 21 timing and scope of his discovery responses and other matters,  
 22 and has ignored communications regarding this litigation; (4)  
 23 McIlwain failed to attend a mediation in person<sup>2</sup>, failed to ensure  
 24 that other counsel for Plaintiff would appear in his stead, and

25 \_\_\_\_\_  
 26 <sup>2</sup> McIlwain represents that he was unable to attend the  
 27 mediation in person because his flight was cancelled. He  
 28 provides no explanation, however, for why he was unable to  
 arrange for other counsel to attend the mediation in person in  
 his stead, or why he was unable to purchase another flight. See  
 Opp'n at 8, Docket No. 95; McIlwain Decl. ¶ 1, Docket No. 96.

1 failed to notify Hagens Berman of the fact that no counsel would  
2 appear in person at the mediation on behalf of Plaintiff; and (5)  
3 McIlwain failed to submit a mediation statement as required by  
4 ADR Local Rule 6-7. Motion at 1-11, Docket No. 93.

5 In his opposition, which was untimely<sup>3</sup>, McIlwain does not  
6 dispute any of Hagens Berman's assertions with respect to his  
7 conduct. See Opp'n at 2-3, Docket No. 95. McIlwain simply  
8 asserts, in conclusory fashion, that "there is good cause" for  
9 any failure on his part to comply with any rule or deadline,  
10 namely a "personal matter involving the custody of [his] 3 year  
11 old daughter in the state of Kentucky." Id. at 2. McIlwain does  
12 not elaborate on this personal matter or explain why it would  
13 justify his failure to comply with applicable rules. Id. The  
14 remainder of McIlwain's opposition is devoted to accusing Hagens  
15 Berman of misconduct, but McIlwain does not explain why any such  
16 misconduct, even if committed, would have any bearing on the  
17 issues raised in the present motion.<sup>4</sup> See id. at 4-10.

18 Because McIlwain does not dispute that he has violated the  
19 local rules and the rules of professional conduct as described in  
20 Hagens Berman's motion, the Court concludes that revoking  
21 McIlwain's pro hac vice admission is warranted. McIlwain's pro  
22 hac vice admission expressly was "subject to the terms and  
23 conditions of Civil L.R. 11-3." See Order at 2, Docket No. 74.  
24 Civil Local Rule 11-3 requires an out-of-state attorney seeking

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25 <sup>3</sup> Although McIlwain's opposition was tardy, the Court has  
26 reviewed and considered it and its attachments for the purpose of  
27 resolving the present motion.

28 <sup>4</sup> McIlwain states in his opposition that he will submit other  
supporting materials "under separate cover for in camera [sic]  
review," but he has not lodged any materials. The record is  
limited to documents that are publicly accessible on ECF.

1 to appear in this Court pro hac vice to certify under oath that  
2 he will abide by the rules of professional conduct described in  
3 Civil Local Rule 11-4, which include the local rules of this  
4 district. See Civil L.R. 11-4. McIlwain's implicit admission  
5 that he has failed repeatedly to comply with these rules is  
6 sufficient to revoke his right to appear pro hac vice in this  
7 action.

8 Separately, the docket reflects multiple instances of  
9 McIlwain's failure to abide by applicable rules and practices.  
10 See, e.g., Order of March 5, 2019, at 2 (noting in response to a  
11 letter that McIlwain filed that "[t]his letter and the requests  
12 therein do not comply with the Court's standing orders or the  
13 local rules of this District"). The Court has instructed  
14 McIlwain on several occasions to comply with all applicable  
15 rules. See, e.g., id. ("The parties are reminded to consult and  
16 comply with all applicable standing orders and local rules. In  
17 the future, the Court will not consider any filings or requests  
18 made in violation of any applicable standing order or local  
19 rule."). Yet, McIlwain has continued to disregard the Court's  
20 orders requiring compliance with applicable rules. One of the  
21 most recent examples of McIlwain's indifference to the Court's  
22 orders and applicable rules is McIlwain's opposition to the

present motion<sup>5</sup>, which he filed three days late.<sup>6</sup> See Docket No. 95.

Where, as here, "an out-of-state attorney suggests through his behavior that he will not 'abide by the court's rules and practices,' the district court may reject his pro hac vice application." In re Bundy, 840 F.3d at 1042 (citation omitted). In light of McIlwain's pattern of disregard of applicable rules and procedures, and in an effort to promote the orderly administration of justice, the Court revokes McIlwain's pro hac vice admission. See In re U.S., 791 F.3d 945, 957 (9th Cir. 2015) ("[A] court's decision to deny pro hac vice admission must be based on criteria reasonably related to promoting the orderly administration of justice, or some other legitimate policy of the courts[.]").

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<sup>5</sup> The opposition was due by August 13, 2019; McIlwain filed his opposition on August 16, 2019. See Docket No. 95. McIlwain states in his opposition that Hagens Berman agreed to a two-day extension of the deadline to file an opposition, which Hagens Berman does not dispute. The opposition still would have been late even if the two-day extension had had any legal effect. The two-day extension was ineffectual, however, because McIlwain never sought a Court order approving any such extension as required by Civil Local Rule 6-1(b). See Civil L.R. 6-1(b) (requiring a court order for any enlargement of time that alters a deadline that involves papers required to be filed or lodged with the court). A request for an extension must be filed no later than fourteen days before the scheduled event or deadline. Id.

<sup>6</sup> Another example of a failure to comply with applicable rules is McIlwain's "objection to reply evidence." See Docket No. 104. A party may file objections to reply evidence "within 7 days after the reply is filed," but such objections "may not include further argument on the motion." See Civil L.R. 7-3(d)(1). McIlwain filed his objection eight days after the reply was filed, so it is untimely. Moreover, the objection fails to comply with Civil Local Rule 7-3(d)(1) for the additional reason that it contains further argument on the motion. In any event, McIlwain's objection has no impact on any of the findings and conclusions herein, which do not rely on any of the materials to which McIlwain objects.



1 II. Monetary sanctions are not warranted at this time

2 Hagens Berman requests that the Court sanction McIlwain under  
3 28 U.S.C. § 1927 and its inherent authority in the amount of the  
4 attorneys' fees and costs it incurred in filing the present  
5 motion. This request is predicated on the same violations of  
6 local rules and standards of professional conduct that formed the  
7 basis of its request to revoke McIlwain's pro hac vice admission.  
8 In its opening brief, Hagens Berman did not specify either a  
9 precise amount, or even an estimate, of the fees and costs it  
10 would seek as a sanction; in its reply brief, Hagens Berman  
11 specified for the first time that it seeks \$22,514 in fees and  
12 \$510 in costs, which it claims represent seventy percent of the  
13 fees and costs it incurred in preparing and filing the present  
14 motion. See Reply at 1, Docket No. 97.

15 The Court declines to impose monetary sanctions on McIlwain  
16 at this time. First, Hagens Berman failed to include in its  
17 opening brief an estimate or range, much less a precise amount,  
18 of the fees and costs it would request as a sanction against  
19 McIlwain; it waited to provide detailed information about its  
20 requested fees and costs until it filed its reply. See generally  
21 Motion, Docket No. 93; Reply at 1, Docket No. 97. The lack of  
22 specificity in Hagens Berman's opening brief as to the amount of  
23 monetary sanctions at stake deprived McIlwain of sufficient  
24 notice and an opportunity to fully respond in writing to the  
25 request for monetary sanctions.

26 Second, Hagens Berman has not shown that McIlwain's conduct  
27 was in bad faith or was tantamount to bad faith. To warrant the  
28 imposition of sanctions under either 28 U.S.C. § 1927 or the

1 Court's inherent authority, the conduct at issue must rise to the  
2 level of bad faith or its equivalent. See Pac Harbor Capital,  
3 210 F.3d at 1118 ("The imposition of sanctions under § 1927  
4 requires a finding of bad faith."); Fink v. Gomez, 239 F.3d at  
5 994 (holding that a finding of "bad faith or conduct tantamount  
6 to bad faith" is required to impose sanctions under the court's  
7 inherent power). Here, based on the record, the Court cannot  
8 conclude that McIlwain's conduct was the equivalent of bad faith,  
9 which would warrant sanctions, as opposed to being the result of  
10 mere negligence without more, which would not warrant sanctions.  
11 See MGIC Indem. Corp. v. Moore, 952 F.2d 1120, 1121-22 (9th Cir.  
12 1991) (reversing imposition of sanctions where the conduct at  
13 issue was "as consistent with negligence as with bad faith").

14 Finally, Hagens Berman has not shown that a sanction of more  
15 than \$20,000 would be properly tailored to the conduct at issue.  
16 Hagens Berman has cited no case in which a court has imposed a  
17 sanction of more than \$20,000 based on behavior and circumstances  
18 similar to those at issue here.

19 Accordingly, Hagens Berman's request for monetary sanctions  
20 is DENIED.

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## CONCLUSION

Hagens Berman's motion is GRANTED IN PART and DENIED IN PART. The motion for an order revoking Timothy Joseph McIlwain's pro hac vice admission is GRANTED. The request for an award of attorneys' fees and costs as a sanction against McIlwain is DENIED.

Nothing in this Order is intended to resolve any dispute arising from a failure by any party to comply with its discovery obligations. As has been stated in prior Orders, any discovery disputes must be addressed and resolved pursuant to the preferred procedures of Magistrate Judge Cousins.

Joshua Schein and Eric Rouen are counsel for Plaintiff McIlwain, LLC. See Docket Nos. 72, 92. All parties and their counsel are ordered comply with upcoming deadlines, which include: (1) the close of discovery on August 30, 2019; (2) the deadline for Hagens Berman to file an opposition to Plaintiff's motion for partial summary judgment, which is September 13, 2019; (3) the deadline for Plaintiff to file a reply in support of its motion for partial summary judgment, which is September 27, 2019; (4) the hearing on the motion for partial summary judgment, which will be held on October 15, 2019, at 2:30 p.m. See Docket No. 91.

IT IS SO ORDERED.

Dated: September 9, 2019



CLAUDIA WILKEN  
United States District Judge